No. 15245

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY W. MATTHEWS AND NETTIE MATTHEWS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF YUBA CITY LIVESTOCK AUCTION COMPANY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

REPLY BRIEF FOR APPELLANT

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The court below held that appellees were not liable to the United States for the reasonable market value of the livestock which they sold without obtaining the consent of the mortgagee, Farmers' Home Administration (R. 10–27). In so holding, the court placed exclusive reliance on the fact that appellees did not have *actual* knowledge of the existence of the lien at the time that the sales were made (*ibid.*). The court recognized that, under the law of the state where the transactions took place (California), appellees would be liable in the circumstances of this case (R. 21). The court held, however, that federal law governs, and that, under that law, actual knowledge is a condition precedent to the imposition of liability in conversion

upon a commission merchant or livestock auctioneer (R. 25–27).

In our main brief we urge that, while the court's determination on the matter of choice of law was correct (despite a contrary decision of the Eighth Circut), its interpretation of federal law is erroneous. In the latter connection, we show there (Br., pp. 16–31) (1) that general commercial law principles are the appropriate source of reference in fashioning the federal rule in this area; (2) that in all but two jurisdictions in the United States (and in all of the leading livestock producing and packing states) a commission merchant is liable to the holder of a prior recorded mortgage even if he does not possess actual knowledge of the mortgage's existence; and (3) that this rule imposing liability is supported not only by the overwhelming weight of authority but, as well, by reason and by congressional enactment.

In their brief, appellees have given hardly more than passing mention either to the single ground upon which the court below based its decision or to our demonstration that the court was in error—seemingly being content, for the most part, to rest upon an incorporation by reference (Br., p. 2) of Judge Murphy's opinion. Instead, the major portion of appellees' brief is addressed to contentions which neither were raised below, by way of answer or otherwise, nor considered by the court. Further, in making these new arguments, appellees have embarked on a major excursion outside the record (Br., pp. 8–9)—offering as justification for doing so the alleged fact that evidence in support of their factual assertions would

have been adduced had the court below not abruptly terminated the trial.[1]

In defending a favorable judgment on appeal, a party is not necessarily restricted to the grounds assigned by the trial court. At the same time, he may not of course ask the appellate tribunal to consider belated contentions which have no foundation in the evidence and in the court's findings of fact derived therefrom. In the circumstances of this case, it is therefore doubtful to what extent appellees' new contentions may properly be raised in this Court. We need not, however, rely on this consideration. For, even if true, appellees' unsupported representations of fact do not detract from the force of the conclusion reached in our main brief that they are liable in conversion as a matter of federal law.

1. It is not disputed that the Government's mortgage was executed and recorded prior to the livestock sales by appellees which occasioned this litigation. Nor is it disputed that, by its terms, the mortgage covered all livestock subsequently acquired by the mortgagor Wheaton.[2] Appellees point (Br., p. 3), however, to the fact that, subsequent to the recordation of the Government's mortgage, Wheaton purchased a number of hogs from one Ruff and, as a

[1] Appellees further suggest (Br., p. 9) that the Government departed from the record on pp. 25–27 of its brief. An examination of the contents of those pages will reflect, we think, the complete lack of substance to this claim.

[2] The validity of an after-acquired property clause such as the one contained in the mortgage here involved is not in issue.

part of the transaction, executed a purchase money mortgage in the latter's favor. Noting further (Br., p. 3) that Wheaton then commingled these animals with his other hogs, appellees suggest the possibility that some of the hogs which they sold on Wheaton's behalf may have been subject to Ruff's mortgage.

We may assume for present purposes that appellees' conjecture is correct—despite Wheaton's uncontradicted testimony that none of the hogs obtained in "the Ruff deal" were delivered to appellees (R. 43–44). We may also assume the validity of their assertion (Br., p. 4) that Ruff's purchase money mortgage created, as to the hogs encompassed by it, a lien which was superior to the lien created by the previously recorded Government mortgage. These assumptions can be readily made because it does not make the slightest difference here whether Ruff had a prior lien on some, or indeed all, of the hogs sold by appellees.

As appellees themselves recognize (Br., p. 4), irrespective of its priority, the Ruff lien could in no event have the effect of destroying the Government's lien. And it is too well settled to be open to question at this date that one who exercises improper dominion over property which is subject to a valid lien may not interpose as a defense that the property is also subject to a prior lien of a third party. Otherwise stated, the holder of a junior lien may maintain an action in conversion so long as he has the right to immediate possession of the converted property as against anyone but the senior holder and those claiming under him. See *e. g., Wichita Mill and Elevator Co.* v. *National Bank of Commerce,* 102 Okla. 95, 227 Pac.

92; *John Smith Co.* v. *Hardin,* 133 Wash. 194, 233 Pac. 628, modified on other grounds, 136 Wash. 694, 238 Pac. 647; *Draper* v. *Walker,* 98 Ala. 310, 13 So. 595; *Talcott* v. *Meigs,* 64 Conn. 55, 29 Atl. 131; *Citizens Nat. Bank* v. *Osborne-McMillan Elev. Co.,* 21 N. D. 335, 131 N. W. 266; *Sperry* v. *Ethridge,* 70 Iowa 27, 30 N. W. 4; *Moore* v. *Prentiss Tool & Supply Co.,* 133 N. Y. 144, 30 N. E. 736; *Treat* v. *Gilmore,* 49 Me. 34. The Government possessed that right here at the time the sales were made.

In short, had appellees searched the lien records of Yuba County, California (where Wheaton then resided) before selling the hogs delivered to them—as they apparently did not—they would have discovered that *all* of Wheaton's livestock were subject to a Government lien and that, as a consequence, the sale of *any* of the hogs would subject them to potential liability in conversion to the Government. The only legitimate doubt that a record search could have engendered would have been with respect to whether the hogs delivered to them for sale had been bought from Ruff and thus were subject to Ruff's lien *in addition to the Government's lien.* While appellees somehow might be able to avail themselves of this uncertainty in a suit brought against them by Ruff, it scarcely is relevant in this action. The inescapable fact is that, respecting their opportunity to discover the existence of a Government lien on the hogs, appellees were in no different position than they would have been in had the Ruff mortgage not been in the picture at all. The "confusing situation"

which appellees seek to inject into the case (Br., p. 6) simply does not exist.[3]

2. Appellees further assert (Br., p. 8) that they were prepared to present evidence in the court below that, as of the date of trial, Wheaton still possessed sufficient personal property to satisfy his indebtedness to the United States. This consideration alone, appellees contend, bars recovery against them. It is their seeming view that an action in conversion may not be maintained by a mortgagee against a third party unless the mortgagor himself is destitute.

We know of no authority, and appellees cite none, which will support this novel proposition. To the contrary, where (as here) there has been a default by the mortgagor entitling the mortgagee to enforce the security underlying the remaining indebtedness, it is for the latter—and not the converter—to decide which portion of the security is to be looked to. In the context of this case, the matter comes down to this. Upon Wheaton's default, the Government could look to any of the property that was subject to the mortgage. Appellees having exercised dominion over, and disposed of, some of that property without the prior consent of the Farmers' Home Administration, the Government had the right to proceed against them in conversion, the measure of damages being the reasonable value of the property

[3] With respect to appellees' contention as to the lamb they converted (Br., p. 6), suffice it to note once more that the mortgage covered all livestock subsequently acquired by the mortgagor. That the mortgagor may not have been principally engaged in sheep raising does not except the lamb from the operation of the after-acquired property clause.

at the time of conversion (not to exceed the remaining indebtedness of Wheaton and less any amount refunded to the Government out of the proceeds of the sales).

Appellees insist (Br., p. 11) that the effect of the imposition of liability upon them would be to entitle Wheaton "to a full satisfaction of his mortgage" and to enable him "to go his way with the remaining property described in the mortgage completely unencumbered." Such is plainly not the case. As appellees stress (Br., p. 4), they exacted a written warranty from Wheaton that the livestock presented for sale were free of encumbrances (R. 30). Thus, appellees have a claim to indemnity from Wheaton for the amount of the Government's recovery against them. If appellees' representations regarding the extent of Wheaton's present property interests are correct, it is difficult to understand why they did not avoid the necessity of a separate suit for indemnity by impleading Wheaton as a third party defendant under Rule 14 of the Federal Rules of Civil Procedure.[4]

3. Appellees' reliance (Br., pp. 12–14) on *Drover's Cattle Loan and Investment Co.* v. *Rice,* 10 F. 2d 510 (N. D. Iowa), and *Blackwell* v. *Laird,* 236 Mo. App. 1217, 163 S. W. 2d 91, is entirely misplaced. As we show in our main brief, *Drover's* followed an early

[4] Even were appellees correct in their belief that the existence of other security constitutes a defense in an action of this kind, the cause would still have to be remanded for the taking of evidence and the making of findings on the extent of Wheaton's personal property.

Tennessee decision which has been expressly or implicitly rejected in every jurisdiction that has considered the issue (with the possible exception of Mississippi). See appellant's brief, pp. 17–19, 23–24. Insofar as *Blackwell* is concerned, its interpretation of Section 205 of the Packers and Stockyards Act is in direct conflict with the interpretation given to the section by all other federal and state courts which have been called upon to construe it. See appellant's brief, pp. 19–21. Further, the result in *Blackwell* is irreconcilable with the result reached by another Missouri Court of Appeals in a later case and there is good reason to believe that it would be disapproved by the Missouri Supreme Court. See appellant's brief, pp. 22–23.

CONCLUSION

For the reasons stated herein, and those set forth in our main brief, it is respectfully submitted that the judgment below should be reversed.

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